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May 8, 2003

Public Docket No. OAR-2003-0046
U.S. Environmental Protection Agency
EPA Docket Center, Air & Radiation Docket
Mail Code 6102T
1200 Pennsylvania Avenue NW
Washington DC 20460

Re: *Control of Emissions from New Nonroad Diesel Engines: Amendments to the Nonroad Engine Definition, 68 Fed.Reg. 17741 et seq., April 11, 2003*

Dear Sir or Madam:

SUMMARY

The South Coast Air Quality Management District staff hereby submits adverse comments on EPA's direct final rule referred to above, and requests that rule be withdrawn.

EPA summarizes the rule as follows: "a direct final rule revising the definition of nonroad engines to include all diesel-powered engines used in agricultural operations in the State of California that are certified by the engine maker to meet the applicable nonroad emission standards. [The] rule will consider such engines as nonroad engines without regard to whether these engines are portable or transportable or how long these engines remain in one fixed location at a farm." (68 Fed.Reg. p. 17741.)

This rule is directly contrary to the Clean Air Act, which clearly distinguishes between nonroad engines and stationary sources. Moreover, it is arbitrary and capricious, since it purports to be based on the assumption that California LAER determinations for similar equipment have required comparable standards to the nonroad engine standards, 68 Fed.Reg. 17745, whereas in fact other stationary engines subject to LAER are required to be up to 30 times cleaner than the nonroad standards. Finally, the rule is an affront to federalism and the primary role of the states to regulate air pollution under the Clean Air Act, since it has the effect of preempting California from regulating an entire class of stationary sources just at the time when such regulation is most needed.

I. THE RULE VIOLATES THE CLEAN AIR ACT

As EPA states (68 Fed.Reg. 17742) "The Clean Air Act divides internal combustion engines into three categories: Stationary internal combustion engines, engines used in highway motor vehicles, and nonroad engines. The last category includes virtually all mobile engines that are not used in motor vehicles. Nonroad engines are considered mobile sources under the Act and are regulated by EPA under Section 213 of the Act."

All of the provisions of the Act relating to nonroad engines are found in Title II, "Emission Standards for Moving Sources." Moreover, the Clean Air Act flatly prohibits EPA from redefining stationary sources as "nonroad engines." As stated in Section 111 (a)(3), 42 USC §7411(a)(3), "Nothing in subchapter II of this chapter relating to nonroad engines shall be construed to apply to stationary internal combustion engines." In short, if an internal combustion engine is stationary, it cannot be a nonroad engine.

As held by the D.C. Circuit Court in a case dealing with EPA's nonroad engine regulations, "The plain meaning of legislation should be conclusive . . . ." *Engine Mfrs. Ass'n. v. U.S.E.P.A.*, 88 F.3rd 1075, 1088 (1996). Nor "may an agency avoid the congressional intent clearly expressed in the text simply by asserting that its preferred approach would be better policy." *Id*. at 1089. By extending the nonroad engine definition to include stationary engines, EPA has clearly violated the Clean Air Act.

While EPA asserts that the "boundaries" between stationary and nonroad engines are "not well delineated in the Act," (68 Fed.Reg. 17742), this does not authorize EPA to define <u>all</u> agricultural engines, including those that are clearly stationary, as nonroad engines. EPA's existing rule excludes engines from the definition of nonroad engines if they act in a stationary manner, even if they are physically movable. (*Id*.) That rule is clearly more consistent with the intent of the Act. The Clean Air Act intends "stationary" engines to be excluded from the definition of nonroad engines (42 USC §7411(a)(3)). Moreover, nonroad engines are intended to refer to "moving" sources, as indicated by the description of Title II found in the Clean Air Act. Engines that are not "moving", even if they may be physically transportable, are not nonroad engines.

There is substantial practical reason for the Clean Air Act to distinguish between moving and stationary sources. Stationary sources can be required to use the cleanest possible fuel, and to install the most up to date add-on controls, including SCR. As discussed below, stationary engines can and do meet far more stringent standards than EPA's momroad standards. Therefore, nonroad engine standards, designed to meet unique requirements of moving sources, are wholly insufficient for stationary applications.

This rule clearly violates the Clean Air Act. It therefore is "in excess of statutory jurisdiction" and "not in accordance with law" as provided in 42 USC §7607(d)(9) and must be set aside.

II. THE RULE IS ARBITRARY AND CAPRICIOUS

A. *California's Lack of Prior Regulation Does Not Justify Preemption*

EPA proffers several purported justifications for this rule, which has the unprecedented effect of preempting California from regulating a whole class of stationary sources. (Under Clean Air Act §209(e), 42 USC §7543(e), state and local agencies are preempted from adopting any standard or requirements relating to the control of emissions from nonroad engines.) None of EPA's justifications withstands scrutiny.

EPA asserts that California has not regulated farm engines anyway, so this rule will result in emission reductions. (68 Fed.Reg. 17742.) However, this is because California state law has previously precluded air districts from requiring permits for farm equipment (Health & Safety Code §42310(e)), so the otherwise stringent California BACT and LAER standards could not be required. (As EPA notes, at p.17742, this exemption has caused EPA to find the California SIP inadequate. *See* 68 Fed.Reg. 7327, February 13, 2003.) Legislation has been introduced to correct this deficiency. It is incomprehensible that at the same time EPA proposes to potentially sanction California for not regulating farm equipment under NSR, it adopts a rule preempting California from virtually any regulation of such equipment.

While EPA's nonroad engine standards may indeed be cleaner than many existing farm engines, it is certainly not necessary to preempt California from all future regulation in order to apply these standards. As EPA recognizes, "Some pieces of stationary agricultural equipment use engines that are certified to nonroad engine standards, or that are identical to certified engines." (p. 17742, n. 3.) Either California districts or EPA under its NSPS authority (42 USC §7411) could require farm engines to meet standards equivalent to nonroad engines. This could easily be done without requiring preemption of other more stringent state and local regulation. Therefore, California's lack of prior regulations due to state law prohibitions enacted at the behest of farm interests that are now being amended-cannot justify this rule.

B. *Preemption Cannot Be Justified on the Basis that BACT & LAER For Diesel Engines is Comparable to Nonroad Engine Standards*

EPA states at p. 17744 that "it would be unlikely stationary source controls would result in any greater control" than the nonroad engine standards. EPA further states that "some recent local decisions regarding LAER and BACT indicate that diesel engines have not generally had to meet NOx emission standards more stringent than current Title II standards for nonroad engines (p. 17745). These statements are demonstrably incorrect. LAER for

stationary internal combustion engines in the South Coast Air Quality Management District is .15 grams brake horsepower hour, or 30 times cleaner than the Tier II standards of 4.9. It is true that to date, diesel fuel cannot meet this standard. But in a recent case where due to unique circumstances (unavailability of natural gas in a mountain area) diesel was allowed to be used, the South Coast AQMD set LAER at .5 grams brake horsepower hour, which is 90% cleaner than Tier II standards. Therefore, it is not accurate that comparable LAER determinations are no more stringent than nonroad standards. South Coast has used nonroad standards only for emergency backup diesel engines, not for ongoing operations.

EPA estimates that this rule would reduce NOx emissions from covered engines by 20% (p. 17744). In contrast, California standards – if not preempted – could require a 90% to over 95% reduction. While the LAER standards discussed above apply to new engines, it is possible that local districts could require the removal of old engines and their replacement by new engines, since, according to EPA, some of these engines "are quite old, dating as far back as 1960." (p. 17743.)

EPA's new rule, and the resulting preemption of state authority, cannot be justified on the ground that state regulation would be no more stringent, or would not result in greater emission reductions.

C. *Preemption Cannot Be Justified on the Ground That EPA's Rules Create Incentives for Voluntary Emission Reductions*

EPA's rule does not require farmers in California to replace their engines with new engines certified to nonroad standards. (p. 17743.) But EPA believes the rule will create an incentive for farmers to do so, since by doing so they can avoid Title V permitting requirements as well as avoid NSR and any future state stationary source controls. (p. 17744.) But EPA's own statements belie the need for such a perverse incentive.

As EPA recognizes, California has already through voluntary incentive programs cleaned up 40% of stationary farm engines to Tier II standards. (p. 17744.) EPA states that it expects U.S. Department of Agriculture funding under its Environmental Quality Incentives Program to help farmers make the transition to Tier II engines. Both federal and state incentive programs could continue to be available without this rule. While this rule may provide some marginal additional incentives, and thus cause short-term emission reductions, these benefits are not worth the price of preempting California, from imposing 30 times more stringent regulation in the long term.

Based on the foregoing, the purported factual and policy basis for the rule is nonexistent. The rule is arbitrary and capricious within the meaning of 42 USC §7607(d)(9), and must be set aside.

III. The Rule Violates Federalism Principles by an Unprecedented Preemption of Stationary Source Regulation

Astoundingly, EPA states at p. 17747, "This rule does not have federalism implications." Nothing could be further from the truth. By this rule, EPA purports to preempt California regulation of stationary sources – an unprecedented interference with state authority under the Clean Air Act. EPA wholly ignores the basic principle of the Clean Air Act that state and local authorities have the primary responsibility for the regulation of air pollution at its source. (42 USC §7401(a).) And as discussed above, the rule violates the Clean Air Act's prohibition on treating stationary engines as nonroad engines. As specified in Executive Order 13132, EPA may not promulgate a rule that preempts state or local law – even if the rules do not have federalism implications – without providing state or local officials with notice and an opportunity to participate in the development of the regulation. (p. 17747.) Nothing of the sort has occurred in this case.

While EPA flagrantly ignores Executive Order 13132, more important is the total lack of recognition of the harm this rule does to state and local regulatory authority. EPA's cursory mention of the preemptive effect of Section 209(e) fails to recognize the significance of subjecting state or local regulation to EPA review and approval. While EPA states (p. 17745) that "The Clean Air Act provides considerable deference to California to promulgate its own standards," under Section 209(e) it is clear that EPA may reject such regulations if California does not need such rules to meet "compelling and extraordinary conditions," or if EPA finds California's determination arbitrary and capricious. This gives EPA veto power over state and local rules, albeit a veto power constrained by statutory requirements.

Heretofore, the Clean Air Act has never been interpreted to preempt state and local regulations of stationary sources, except that such regulation may not be <u>less</u> stringent than EPA minimum requirements, 42 USC §7416. In this case, EPA takes the unprecedented step of preempting <u>more</u> stringent state and local regulation of stationary sources. Nothing in the language or legislative history of the Act authorizes such an interpretation. As noted above, local APCD requirements for stationary engines are up to 30 times more stringent than the voluntary EPA standards imposed by this rule. By preempting such requirements, EPA deprives the Districts of their most powerful tools at a time when they are needed most. As EPA has recognized, agricultural engines are a significant source of NOx and PM10 emissions. (p. 17743-44.) A groundbreaking study in the South Coast Air Quality Management District showed diesel particulate to be responsible for over 70% of risk from carcinogenic air emissions in the District. With the new EPA standards for ozone and PM2.5, emission reductions of NOx from internal combustion engines will be absolutely crucial in the future. Plainly, there is no justification whatsoever for EPA to preempt more stringent state and local standards for farm engines. The rule is arbitrary and capricious within the meaning of 42 USC §7607(d)(9) and must be set aside.

CONCLUSION

The rule promulgated by EPA to preempt state and local regulation of farm engines cannot withstand legal or policy scrutiny. The rule violates the Clean Air Act by arbitrarily reclassifying stationary internal combustion engines as nonroad engines, contrary to the plain language of 42 USC §7411(a)(3). None of the factual or policy justifications for the rule can withstand scrutiny. The rule would preempt state and local regulation that is 10 to 30 times more stringent than the rule EPA imposes. Therefore, the rule's purported "emission reduction" justification is arbitrary and capricious. The rule violates the most basic principles of federalism of the Clean Air Act by preempting state and local regulation of stationary sources. Preemption does not exist unless Congressional intent to do so is "clear and manifest." *Exxon Mobil. v. USEPA*, 217 F3d 1246, 1255 (2000) *citing New York State Conference of Blue Cross and Blue Shield Plans v. Travelers Ins. Co.*, 514 US 645, 654-55 (1995). Here congressional intent is precisely to the contrary, since state and local regulation is allowed to be more stringent than EPA minimums except for certain regulation of "moving sources" (42 USC §7416). Nothing in the Act authorizes EPA preemption of stationary sources, as is attempted in this case.

While this rule is flatly contrary to law and public policy, it represents one step forward in EPA thinking. By this rule, EPA recognizes – at last – that not all rules need be national in scope. For at least eight years California has been asking EPA to regulate sources of emissions that are exclusively within federal jurisdiction. While avoiding national regulation (which is clearly authorized by the Act), EPA has maintained that it may not regulate on a regional basis to address California's unique needs. By this rule, EPA at last recognizes the baselessness of that argument. The particular rule in this case does not justify California only regulation – for why should a source be stationary in Texas but mobile in California? However, at least EPA has opened the door to regional regulation. Beyond any doubt, the needs of an extreme ozone nonattainment area would justify regional regulation of sources under federal jurisdication if EPA were not inclined to adopt a national rule. The South Coast AQMD heartily endorses EPA's recognition of the viability of regional regulation, in the form of more stringent rules for extreme ozone nonattainment areas.

Sincerely,

/S/

Barry R. Wallerstein, D.Env.
Executive Officer

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